

## RESPONSES

### **Remark 1:**

Applicant has amended the independent claims to more definitely claim the invention. Applicant submits that the amendments overcome the rejections based on the cited prior art.

### **Remark 2:**

Applicant submits that the amendments to Claim 1 obviate and therefore overcome the rejections under 35 U.S.C. 112. The construction which the Examiner has ascribed the expression “consisting of” is unsupported in the specification. Furthermore, Applicant hereby respectfully generally denies any such construction in particular. Nevertheless, the alternate expression “comprising” is adequately and inherently supported in the specification and thus more definitely claims the invention.

### **Remark 3:**

Applicant submits that the Stroll reference completely fails to suggest or consider the possibility of use of capsicum as a treatment for crop seeds and grains as a protectant of the plants during emergence. The use as a pre-emergent is not suggested. Stroll is not only an undocumented anecdotal internet reference, it is also directed to virus inhibition rather than insecticidal activity or application. Applicant submits that Stroll does not fairly teach or suggest “that plants can be foliarly treated at any time”. Stroll merely suggests that capsicum-containing solution can be applied directly to garden vegetable plants.

### **Remark 4:**

Applicant submits that the Talbot et al. reference is directed solely to protecting growing plants against fungal or microbial pathogens. The reference is completely devoid of any teaching or suggestion of any insecticidal activity or application of these compounds.

**Remark 5:**

Applicant submits it is well settled that in order for references to be properly combined under 35 U.S.C. 103, there must be a teaching in at least one of the references to suggest that the disclosure of any of the other references could be modified to produce the Applicants' claimed invention. *ACS Hospital System, Inc. v. Montefiore Hospital et al.*, 221 U.S.P.Q. 929 (Fed. Cir. 1984); *Orthopedic Equip. Co. v. U.S.*, 217 U.S.P.Q. 193 (Fed. Cir. 1983). Additionally, absent some suggestion or incentive, the teachings of references may not be combined. *ACS, supra*, 221 U.S.P.Q. 933, *In re Rinehart*, 531 F. 2d 1048, 189 U.S.P.Q. 143 (C.C.P.A. 1976).

In the present case, there would be no incentive to combine the teachings of Stroll with those of Talbot et al. Stroll is clearly not directed to treatment of seeds or grains as a pre-emergent. Stroll is in fact silent with respect to the use of capsicum as a pre-emergent treatment of seeds and grains. Furthermore, Talbot et al. is directed to the destruction of plant fungal and bacterial pathogens, not insecticides. In fact, not a single one of the dozens if not hundreds of species and strains of crop and agricultural insects referenced by Applicant on page 20 line 16 through page 21 line 9 of the present application is mentioned, described, suggested or otherwise remotely anticipated by Talbot et al.

In short, it would not be obvious to one skilled in the art of destruction of crop and agricultural insects to combine a reference directed to the use of capsicum as a virus-inhibiting plant spray with another reference for protecting growing plants against fungal or microbial pathogens to contact seeds and grains with capsicum to protect them from crop and agricultural insects during plant emergence.

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**Remark 6: (NO NEW MATTER)**

Applicant submits that the amendments presented herein present no new matter. All of the subject matter claimed herein are taught in the Drawings, Specification, Claims and Abstract and other portions of the Application as originally filed.

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## CONCLUSION

Applicant respectfully submits that for all the foregoing reasons, the claimed subject matter describes patentable invention. Furthermore, Applicant submits that the specification is adequate and that the claims are in a condition for allowance. No new matter has been entered.

Applicant hereby respectfully requests Examiner to enter these amendments, find them descriptive of useful, novel and non-obvious subject matter, and authorize the issuance of a utility patent for the truly meritorious, deserving invention disclosed and claimed herein.

Without further, Applicant does not intend to waive any claims, arguments or defenses that they may have in response to any official or informal communication, paper, office action, or otherwise, and expressly reserves the right to assert any traverse, additional grounds establishing specificity and clarity, enablement, novelty, uniqueness, non-obviousness, or other patentability, etc.

Further, nothing herein shall be construed as establishing indirectly the basis for any prosecution history, file wrapper estoppel, or similar in order to limit or bar any claim of infringement of the invention described herein, either directly or under applicable doctrine of equivalents.

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Respectfully submitted,

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ATTORNEY AT LAW

Dated: September 28, 2005

By:

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**CERTIFICATE OF MAILING**

I hereby certify that this paper and the documents attached hereto are being deposited in a postage prepaid, sealed envelope with the United States Postal Service using First Class Mail service under 37 CFR 1.08 on the date indicated and is addressed to "Commissioner For Patents, Alexandria, Virginia 22313-1450". Signed: John H. Hause.

Date Mailed: September 28, 2005 .

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

The amendment document filed on 18 July 2005 is considered non-compliant because it has failed to meet the requirements of 37 CFR 1.121. In order for the amendment document to be compliant, correction of the following item(s) is required.

THE FOLLOWING MARKED (X) ITEM(S) CAUSE THE AMENDMENT DOCUMENT TO BE NON-COMPLIANT:

- 1. Amendments to the specification:
  - A. Amended paragraph(s) do not include markings.
  - B. New paragraph(s) should not be underlined.
  - C. Other \_\_\_\_\_.
- 2. Abstract:
  - A. Not presented on a separate sheet. 37 CFR 1.72.
  - B. Other \_\_\_\_\_.
- 3. Amendments to the drawings:
  - A. The drawings are not properly identified in the top margin as "Replacement Sheet," "New Sheet," or "Annotated Sheet" as required by 37 CFR 1.121(d).
  - B. The practice of submitting proposed drawing correction has been eliminated. Replacement drawings showing amended figures, without markings, in compliance with 37 CFR 1.84 are required.
  - C. Other \_\_\_\_\_.
- 4. Amendments to the claims:
  - A. A complete listing of all of the claims is not present.
  - B. The listing of claims does not include the text of all pending claims (including withdrawn claims).
  - C. Each claim has not been provided with the proper status identifier, and as such, the individual status of each claim cannot be identified. Note: the status of every claim must be indicated after its claim number by using one of the following status identifiers: (Original), (Currently amended), (Canceled), (Previously presented), (New), (Not entered), (Withdrawn) and (Withdrawn-currently amended).
  - D. The claims of this amendment paper have not been presented in ascending numerical order.
  - E. Other: The text of claims that are currently amended is improper. 37 CFR 1.121 states, inter alia, that "The text of any deleted matter must be shown by strike-through except that double brackets placed before and after the deleted characters may be used to show deletion of five or fewer consecutive characters." In the amendment received 18 July 2005 claim 1, for example, appears to use single parentheses to denote deleted text.

For further explanation of the amendment format required by 37 CFR 1.121, see MPEP § 714 and the USPTO website at <http://www.uspto.gov/web/offices/pac/dapp/ropa/preognitice/officeflyer.pdf>.

TIME PERIODS FOR FILING A REPLY TO THIS NOTICE:

1. Applicant is given **no new time period** if the non-compliant amendment is an after-final amendment or an amendment filed after allowance. If applicant wishes to resubmit the non-compliant after-final amendment with corrections, the **entire corrected amendment** must be resubmitted within the time period set forth in the final Office action.
2. Applicant is given **one month**, or thirty (30) days, whichever is longer, from the mail date of this notice to supply the **corrected section** of the non-compliant amendment in compliance with 37 CFR 1.121, if the non-compliant amendment is one of the following: a preliminary amendment, a non-final amendment (including a submission for a request for continued examination (RCE) under 37 CFR 1.114), a supplemental amendment filed within a suspension period under 37 CFR 1.103(a) or (c), and an amendment filed in response to a Quayle action.

Extensions of time are available under 37 CFR 1.136(a) only if the non-compliant amendment is a non-final amendment or an amendment filed in response to a Quayle action.

Failure to timely respond to this notice will result in:

Abandonment of the application if the non-compliant amendment is a non-final amendment or an amendment filed in response to a Quayle action; or

Non-entry of the amendment if the non-compliant amendment is a preliminary amendment or supplemental amendment.

JEFFREY L. GELLNER  
PRIMARY EXAMINER



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